

A **FAUZIAH ISMAIL & ORS**

v.

B **LAZIM KANAN & ORANG-ORANG YANG
TIDAK DIKETAHUI**

C COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MOHTARUDIN BAKI JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: B-02(IM)-2779-11-2012]
17 APRIL 2013

D **LAND LAW:** *Malay reservations - Dealings in reservation land - Land held by non-Malay - Meaning of 'Malay' - Whether Malay Reserve Land could be sold to non-Malay or non-citizen - Claim that Malay Reserve Land bought from Malay owner - Occupant Indonesian at time of purchase and later became Malaysian citizen - Whether occupant considered non-Malay and non-citizen of Malaya at material time - Whether sale and purchase agreement relied upon by occupant to prove claim to land void ab initio and unenforceable - Malay Reservation Enactment (FMS Cap 142), ss. 8(1) & 19*

F The appellants, who were the registered owners of a piece of Malay Reserve Land ('the land'), discovered that the respondents were occupying it without their consent. The appellants initially gave notice to vacate and when that failed, they applied to the High Court by way of originating summons ('OS') under O. 89 of the Rules of the High Court 1980 (now the Rules of Court 2012) for vacant possession. The respondents contended that they were lawful owners of the land and relied upon a sale and purchase agreement ('SPA') executed between the appellants' late father, Ismail, who was then owner of the land, and the named respondent, Lazim bin Kanan ('Lazim'). The SPA stated that the land had been sold to Lazim for RM5,000 which sum had been fully paid. Lazim was born in Indonesia and was not a citizen of Malaya at the time the SPA was executed. He only became a Malaysian citizen sometime after the appellants had filed their OS. When the High Court ordered the OS to be converted to a writ, the appellants filed an application under O. 14A and/or O. 33 rr. 2 and 5 of the Rules of the High Court 1980 (now Rules of Court 2012) to determine the preliminary issue of whether the land could be sold to a non-citizen of Malaysia. The High Court, in dismissing the said application, held that the determination of

that question would not resolve the appellants' claim to the land. The court, *inter alia*, held that the respondents had proved they were not trespassers but had come upon the land with the consent of its previous owner pursuant to the SPA under which consideration was paid. The appellants appealed to the Court of Appeal ('COA') against the decision. The respondents, whilst conceding that Lazim was not Malay when he executed the SPA, moved the COA to allow the respondents continued possession of the land in view of the long period of time they had been occupying it. The issues that arose were (i) whether a Malay Reserved Land could be sold to a non-citizen of Malaysia and (ii) whether the sale transaction was valid under the relevant law *ie*, the Malay Reservation Enactment (FMS Cap 142).

Held (unanimously allowing appeal; entering judgment in favour of appellants)

Per Ramly Ali JCA delivering the judgment of the court:

- (1) The application under O. 14A and/or O. 33 r. 2 of the RHC (now Rules of Court 2012) was an appropriate one for the summary determination of the case. The relevant undisputed facts were sufficient to determine the question posed by the appellants. There was no necessity to go for trial to adduce other evidence as was ordered by the High Court judge. (para 32)
- (2) Based on the undisputed relevant facts relating to the issue in question and the interpretation of the relevant laws and documents in the present case, the answer to the question posed by the appellants was in the negative *ie*, the land could not be sold to a non-Malay or non-citizen. The SPA relied upon by the respondents was void *ab initio* and unenforceable. (para 32)
- (3) Section 8(1) of the Malay Reservation Enactment (Chapter 142) provides that no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay. Section 19 of the same Enactment provides that the effect of dealings contrary to the Enactment is void. At the time the SPA was entered into, Lazim was not a citizen of Malaysia. Therefore he could not claim to be Malay for the purpose of the Enactment. He was not eligible to be one at the material time. (paras 18, 19, & 23)

- A (4) Section 2 of the Enactment defined ‘Malay’ as a person who
belonged to any Malayan race and habitually spoke the Malay
language or any Malayan language and professed the Muslim
religion. The words ‘Malayan race’ referred to a race in
B Malaysia (or Malaya previously). In other words, it referred to
a citizen of the country, not to a non-citizen. (para 24)
- (5) Even if the definition of ‘Malay’ under art. 160 of the Federal
Constitution was referred to, while Lazim may have been
someone who habitually spoke the Malay language, professed
C the religion of Islam and conformed to Malay custom, he did
not qualify for citizenship as he was born in Indonesia before
Merdeka Day and not in the Federation or in Singapore;
neither was there evidence to show he was born of parents
one of whom was born in the Federation or in Singapore, or
D was on that day domiciled in the Federation or in Singapore.
(paras 25 & 26)
- (6) Since a non-Malay purchaser could not acquire title to Malay
Reserve Land under the Enactment, there could not be any
other way by which such a purchaser could acquire it. A long
E period of occupation and stay on the land by the respondents
could not create any form of entitlement to the land. To allow
the purchaser to acquire title by any other means not in
accordance with the Enactment would defeat the aim of the
Enactment which was to safeguard Malay ownership of Malay
F Reservation Lands. (paras 30 & 31)

Bahasa Malaysia Translation Of Headnotes

- Perayu-perayu, pemilik berdaftar sebidang Tanah Rizab Melayu
(‘tanah’), mendapati bahawa responden-responden telah menduduki
G tanah tersebut tanpa persetujuan mereka. Perayu-perayu pada
mulanya memberikan notis untuk mengosongkan tanah tersebut
dan apabila ia gagal dilaksanakan, mereka memohon kepada
Mahkamah Tinggi melalui saman pemula (“SP”) di bawah A. 89
H Kaedah-Kaedah Mahkamah Tinggi 1980 (sekarang Kaedah-Kaedah
Mahkamah 2012) untuk milikan kosong. Responden-responden
menghujahkan bahawa mereka adalah pemilik-pemilik sah dan telah
bergantung kepada satu perjanjian jual beli (‘PJB’) yang telah
dimeterai di antara bapa perayu yang sudah meninggal dunia,
I Ismail, yang pada masa itu adalah pemilik tanah tersebut, dengan
responden yang dinamakan, Lazim bin Kanan (“Lazim”). PJB
menyatakan bahawa tanah tersebut telah dijual kepada Lazim

untuk harga RM5,000 yang telah dibayar penuh. Lazim telah dilahirkan di Indonesia dan bukan warganegara Malaysia pada masa PJB tersebut telah dimeterai. Dia hanya menjadi warganegara Malaysia selepas perayu-perayu telah memfailkan SP. Apabila Mahkamah Tinggi memerintahkan supaya SP ditukar kepada writ, perayu-perayu memfailkan permohonan di bawah A. 14A dan/atau A. 33 k. 2 dan k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980 (sekarang Kaedah-Kaedah Mahkamah 2012) untuk menentukan isu awalan sama ada tanah tersebut boleh dijual kepada seseorang yang bukan warganegara Malaysia. Mahkamah Tinggi menolak permohonan tersebut dan memutuskan bahawa penentuan persoalan itu tidak akan menyelesaikan tuntutan perayu-perayu ke atas tanah itu. Mahkamah, antara lain, memutuskan bahawa responden-responden telah membuktikan bahawa mereka bukan penceroboh dan telah datang kepada tanah tersebut dengan persetujuan pemilik sebelumnya di bawah PJB di mana bayaran penuh telah dibuat. Perayu-perayu merayu kepada Mahkamah Rayuan (MR') terhadap keputusan tersebut. Responden-responden, walaupun bersetuju bahawa Lazim bukan berbangsa Melayu semasa dia melaksanakan PJB, telah meminta MR membenarkan responden-responden milikan berterusan ke atas tanah tersebut memandangkan mereka telah mendudukinya dalam masa tempoh yang panjang. Isu-isu yang timbul adalah (i) sama ada Tanah Rizab Melayu boleh dijual kepada seseorang yang bukan warganegara Malaysia dan (ii) sama ada transaksi jualan adalah sah di bawah undang-undang relevan iaitu Enakmen Rizab Melayu (FMS Cap 142) ('Enakmen').

Diputuskan (sebulat suara membenarkan rayuan; memberi penghakiman yang memihak kepada perayu-perayu)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

- (1) Permohonan di bawah A. 14A dan/atau A. 33 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 (sekarang Kaedah-Kaedah Mahkamah 2012) adalah sesuai bagi penentuan ringkasan kes. Fakta-fakta relevan yang tidak dipertikaikan adalah memadai untuk menentukan persoalan yang dikemukakan oleh perayu-perayu. Tiada keperluan untuk ke mahkamah bicara bagi mengemukakan keterangan lain seperti yang diperintahkan oleh Hakim Mahkamah Tinggi.
- (2) Berdasarkan fakta-fakta relevan yang tidak dipertikaikan berkenaan isu yang dipersoalkan dan tafsiran undang-undang berkaitan serta dokumen-dokumen di dalam kes ini, jawapan

- A kepada soalan yang telah dikemukakan oleh perayu-perayu dijawab secara negatif, iaitu tanah tersebut tidak boleh dijual kepada bukan Melayu atau bukan warganegara. PJB yang telah dirujuk oleh responden-responden adalah void *ab initio* dan tidak boleh dikuatkuasakan.
- B (3) Seksyen 8(1) Enakmen Rizab Melayu (FMS Cap 142) menyatakan bahawa tanah pegangan Melayu tidak boleh dipindahmilik, digadai, dipajak atau selainnya dilupuskan kepada sesiapa yang bukan berbangsa Melayu. Seksyen 19 Enakmen
- C yang sama menyatakan bahawa kesan urusan yang bertentangan dengan Enakmen adalah terbatal. Pada masa PJB dimeterai, Lazim bukan warganegara Malaysia. Oleh itu, dia tidak boleh membuat tuntutan bahawa dia adalah seorang yang berbangsa Melayu bagi tujuan Enakmen. Dia tidak layak pada waktu material itu.
- D (4) Seksyen 2 Enakmen mendefinisikan ‘Melayu’ sebagai orang yang berbangsa Malaya dan secara lazimnya bercakap dalam bahasa Melayu atau apa-apa bahasa Malaya dan menganuti agama Islam. Perkataan “bangsa Malaya” merujuk kepada
- E kaum di Malaysia (atau Malaya sebelum ini). Dalam erti kata lain, ia merujuk kepada warganegara sebuah negara, dan bukan kepada bukan warganegara.
- F (5) Walaupun definisi ‘Melayu’ di bawah per. 160 Perlembagaan Persekutuan dirujuk, Lazim mungkin seseorang yang bercakap bahasa Melayu secara lazimnya, menganuti agama Islam dan mengikut adat Melayu, tetapi dia tidak layak menjadi warganegara kerana dia dilahirkan di Indonesia sebelum Hari Merdeka dan bukan dalam Persekutuan atau di Singapura; juga
- G tiada keterangan yang menunjukkan bahawa dia dilahirkan kepada ibu bapa yang salah satunya dilahirkan di dalam Persekutuan atau di Singapura, atau pada hari itu bermastautin di Perlembagaan atau di Singapura.
- H (6) Oleh kerana pembeli bukan Melayu tidak boleh memperolehi hak milik Tanah Rizab Melayu di bawah Enakmen, tiada cara lain untuk pembeli memperolehinya. Tempoh masa pendudukan yang panjang oleh responden-responden tidak boleh mewujudkan apa-apa bentuk hak ke atas tanah itu. Untuk membenarkan
- I pembeli memperolehi hakmilik melalui cara-cara lain yang tidak mengikut Enakmen akan mengalahkan tujuan Enakmen iaitu untuk melindungi pemilikan Melayu ke atas Tanah Rizab Melayu.

Case(s) referred to:

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2007] 6 CLJ 741 CA (refd) A

Haji Hamid Ariffin & Anor v Ahmad Mahmud [1976] 1 LNS 36 FC (refd)
Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal
 [2003] 4 CLJ 337 CA (refd)

Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC (refd) B

Legislation referred to:

Federal Constitution, arts. 19(1), (a)(i), 160

Kedah Malay Reservation Enactment, s. 6(2)

Malay Reservations Enactment, ss. 2, 8(i), 19

Rules of the High Court 1980 (Rules of Court 2012), O. 14A rr. 1(1),
 (2), O. 33 rr. 2, 5, O. 89 C

For the appellants - Abdul Shukur Tokachil (Nor Nadiya Mohd Hafidz with him); M/s Shukor & Assocs

For the respondents - Mohd Hisham Md Nen; M/s Zairus & Dora D

[Appeal from High Court, Shah Alam; Originating Summons No: 24-1115-2010]

Reported by Ashok Kumar

E

JUDGMENT

Ramly Ali JCA:

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The Appeal

[1] The present appeal before us is against the decision of the learned High Court Judge dismissing the appellants'/plaintiffs' application under O. 14A and/or O. 33 rr. 2 and 5 of the Rules of the High Court 1980 (now the Rules of Court 2012). G

Factual Background

[2] The appellants are the registered owners of the land held under title GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan, which is a Malay reserved land (the said land). H

[3] On 18 January 2009, the appellants discovered that the respondents were trespassing, occupying and staying on the said land without the consent of the appellants. The appellants then issued a notice dated 2 December 2009 for the respondents to I

- A vacate the said land. The respondents failed or refused to do so and subsequently on 14 May 2010 the appellants commenced an action at the Shah Alam High Court to remove the respondents from the said land.
- B [4] In their defence, the respondents (as the defendants at the High Court) contended that they are the lawful owners of the said land and averred that one Lazim bin Kanan (the named respondent/defendant) had entered into a sale and purchase agreement dated 16 December 1993 with the appellants' late father, one Ismail bin Duahat, who was at the material time the registered owner of the said land wherein the said Ismail bin Duahat had allegedly sold to the said Lazim bin Kanan part of the said land (where the respondents are now occupying) for a total consideration of RM5,000.
- C
- D [5] It is not in dispute that the said land was and still is a Malay reserved land. ("Tanah Simpanan Melayu" - as appears in the relevant Form 5DK of the Geran Mukim). It is also not in dispute the said Lazim bin Kanan (the purchaser of the said land) was born in Indonesia on 13 November 1946 and had entered
- E Malaysia *vide* Entry Permit Number A61045. Only on 16 December 2010, was he conferred the status of citizen of Malaysia under art. 19(1)(a)(i) of the Federal Constitution. In other words, when the said sale and purchase agreement in respect of the said land was signed between the appellants' late father, Ismail bin Duahat and the said Lazim bin Kanan on 16 December 1993, the said Lazim was not a citizen of Malaysia.
- F
- G [6] The said sale and purchase agreement was dated 2 August 1993 (as appears in the preamble) but was only signed by the parties on 16 December 1993. The contents of the said sale and purchase agreement is reproduced below:

PERJANJIAN JUAL TANAH

- H BAHAWA satu perjanjian diperbuat pada hari ini bertariikh 2hb Ogos, 1993 di Kajang, Selangor Darul Ehsan di antara ISMAIL BIN DUAHAT - K.P. No: 0571805(B) dari alamat SRD 662/1, Kg Sg Ramal Dalam, 43000 Kajang, Selangor Darul Ehsan (Adalah sebagai pihak 'Penjual Tanah') dan di satu pihak ialah LAZIM BIN KANAN - K.P. No. 8441715(M) dari alamat
- I Sg Ramal Dalam, 43000 Kajang, Selangor Darul Ehsan (Adalah sebagai pihak 'Pembeli Tanah') seperti mana perjanjian yang dinyatakan di bawah:

BAHAWA penjual tanah memiliki tanah yang dikenali EMR: 5516 LOT: 1642 Mukim: Kajang, tanah tersebut terletak di Kg Sg Ramal Dlm mengaku telah menjualkan tanah seluas 1 rantai sahaja kepada pembeli untuk mendirikan rumah kediaman bagi dapat pembeli dan keluarganya mendiami di atas tanah tersebut dengan harga sebanyak RM5,000.00.

A

Dengan ini tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak untuk ganggu atau sebagainya seperti mana telah saya persetujui dengan pembeli.

B

Pembeli dengan ini bersetuju dengan pengakuan dari penjual tanah itu dan dengan ini menyerahkan bayaran sebanyak RM5,000.00 secara tunai seperti mana dikehendaki oleh penjual.

C

Dengan ini pembeli membina sebuah rumah untuk kediaman keluarganya.

Dengan ini kedua-dua pihak telah bersetuju dengan syarat-syarat di atas maka perjanjian ini ditandatangani oleh kedua-dua pihak berhadapan saksi-saksinya.

D

Ditandatangani oleh:

Ditandatangani oleh:

t.t.

t.t. 8441715

E

...

...

(Ismail Bin Duahat)

(Lazim Bin Kanan) 16/12/93

Disaksikan oleh:

Ditandatangani Oleh:

Ramli B Siamat I/C 1212909

t.t.

F

t.t.

Abdul Jalal Agil

...

...

I/C 3007107

[7] The said sale and purchase agreement clearly indicates that the transaction was an outright sale of the said land from Ismail bin Duahat (as the vendor) to Lazim bin Kanan (as the purchaser) for a purchase price of RM5,000. By the said sale, the land was fully vested with the purchaser (“... tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak ganggu atau sebagainya ...”).

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The Appellants' Claim

[8] On 14 May 2010 the appellants (as the plaintiffs at the court below) filed an action by way of originating summons under O. 89 of the RHC 1980. On 17 October 2011 the court ordered that the matter be proceeded with as a writ and the affidavits

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A were to be treated as pleadings. On 17 July 2012 the appellants (as the plaintiffs) filed an application under O. 14A and/or O. 33 rr. 2 and 5 of the RHC 1980 to determine the following preliminary issue:

B Whether the land held under title GM 820, Lot 1642, Mukim Kajang, Daerah Hulu Langat, Negeri Selangor Darul Ehsan ("the said Land") which is a Malay reserved land, can be sold to a non-citizen of Malaysia

Findings Of The Judge

C [9] The learned High Court Judge, had on 1 November 2012 adjudged that before the question posed in the application could be decided the following issues needed to be determined first:

D (a) the validity of Ismail bin Duahat's signature, as the previous registered owner of the said land, on the impugned sale and purchase agreement;

(b) whether parties to the impugned sale and purchase agreement were aware that the said land was a Malay reserved land; and

E (c) whether the respondent has equitable interest on the said land after paying RM5,000 to Ismail bin Duahat.

F [10] The learned High Court Judge in delivering her judgment made certain findings of facts, as follows:

(a) the respondents (defendants) have proven that they were not trespassers on the said land;

G (b) the respondents' occupation on the said land was made with the consent of the previous owner of the said land together with a consideration; and

(c) the impugned sale and purchase agreement existed.

H [11] The learned High Court Judge also found that the question posed by the appellants in the application would not resolve the appellants' claim on the said land. Therefore the said application was dismissed with costs. The appellants then filed a notice of appeal to the Court of Appeal. Hence the present appeal before us.

I

Our Findings

A

Order 14A And O. 33 r 2, The Rules Of Court 2012

[12] The relevant provision for consideration is O. 14A of the RHC 1980 (now the Rules of Court 2012). Order 14A rr. 1(1) and (2) provides:

B

1(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

C

(a) such question is suitable for determination without the full trial of the actions; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

D

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

[13] In a nutshell the order enables the court to determine any question of law or construction of document where it appears that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein. The purport of O. 14A is that where it appears to any party that a question of law or construction is apparent on the pleadings and determination by the court will finally dispose of the matter this order can be invoked without the necessity of having to go for full trial. To go for full trial in cases of that nature would defeat the very reason for the creation of the order. Rule (2) of the order enables the court to summarily enter judgment, which would finally dispose of the matter. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then apply the relevant rules to the facts as found. (See: *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741; [2008] 2 MLJ 812 - Court of Appeal and *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 - Court of Appeal).

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[14] Alternatively, the same application can also be made under O. 33 r. 2 of the Rules of Court 2012. Under the said rule, the court may order any question or issue arising in any cause or

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- A matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matters and the court may give directions as to the manner in which the question or issue shall be stated. As a general rule, the court will exercise its
- B power under this rule if the trial of the question or issue will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial. As a whole the outcome of the application will depend very much on the facts of each case. Under O. 33 r. 5, the court may give
- C judgment and allow the plaintiff's claim; or dismiss the cause.

- [15] In the present case, the appellants as the registered owners were claiming for vacant possession of the said land in question. The named respondent, Lazim bin Kanan in his defence, claimed
- D that he was the rightful owner of the said land based on the sale and purchase agreement dated 16 December 1993 wherein the appellants' late father, Ismail bin Duahat, who was at the material time the registered owner of the said land had allegedly sold the said land to the named respondent, Lazim bin Kanan. This fact is
- E clearly pleaded in the statement of claim.

- [16] An important and relevant issue of law had been framed and raised by the appellants ie, whether the said land which is a Malay reserved land can be sold to a non-citizen of Malaysia. The question posed seeks to determine whether the sale transaction is
- F valid under the relevant law ie, the Malay Reservations Enactment (Chapter 142). If the answer is in the negative, the court may make a subsequent order to allow the appellants' claim, against the respondents. If the answer is in the affirmative, ie, that the transaction is valid under the law, then the parties may proceed
- G in the matter based on the position of the law determined by the court.

- [17] The relevant facts necessary for determination of the issue posed by the appellants in their application under O. 14A and/or
- H O. 33 r. 2 of the Rules of Court 2012 are as follows:

- (a) that the said land in question was at the material time, a Malay reserved land;
- I (b) that, even accepting the respondents' line of defence, the said land was sold to the named respondent, Lazim bin Kanan by the appellants' late father, Ismail bin Duahat *vide* a sale and purchase agreement signed on 16 December 1993;

(c) that the sale was an outright sale where the property in the said land was vested in the said Lazim bin Kanan; A

(d) that the said purchaser, Lazim bin Kanan at the time of the alleged sale transaction in 1993 was not a citizen of Malaysia; he was born on 13 November 1946 in Indonesia and that he entered Malaysia *vide* Entry Permit Number A 61045; and B

(e) that the said Lazim bin Kanan was only conferred the status of a citizen of Malaysia under art. 19(1)(a)(i) of the Federal Constitution on 16 December 2010. C

[18] Section 8(i) of the Malay Reservations Enactment (Chapter 142) provides:

Subject to the provisions of sub-section (ii) and of section 16 and 17 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer charge or lease in contravention of this section shall be capable of registration in any Land office or Registry of Titles. D

[19] Section 19 of the same Enactment provides that the effect of dealings contrary to the Enactment is void. The provision states: E

(i) All dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any Court. F

(ii) No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Malay holding contrary to the provisions of this Enactment. G

[20] On this point, the Federal Court had laid down the principle of law in a case where a Malay reserved land was sold by way of an outright sale, to a non-Malay, contrary to the relevant provisions of the Malay Reservations Enactment in the case of *Robert Lee & Anor v. Wong Ah Yap & Anor* [2007] 4 CLJ 1; [2007] 4 MLJ 393. Abdul Hamid Mohamad FCJ held that where land is subject to a relevant Enactment or Ordinance, the sale thereof to a person unqualified under the Enactment or Ordinance being a non-Malay is not valid. It was also held in that case, “the H I

- A argument that property in land can pass under an illegal and therefore unenforceable contract will defeat the whole purpose of the creation of customary lands and Malay reserved lands. It would amount to giving effect to a transaction clearly prohibited by law.”
- B [21] The effect of the question posed by the appellants in their application under O. 14A is that if the sale and purchase of the said land from the late Ismail bin Duahat to Lazim bin Kanan in 1993, is contrary to the Malay Reservations Enactment (Chapter 142), then the sale is void and the sale and purchase agreement signed by the parties on 16 December 1993 cannot be enforceable in law. That being the case, the respondents’ defence must fall and judgment can be entered in favour of the appellants (as the plaintiffs at the court below). In other words, the determination of the question posed by the appellants will dispose of the entire cause in the claim. Therefore, we are of the view that this is a fit and proper case to be summarily determined under O. 14A and/or O. 33 rr. 2 and 5 of the Rules of Court 2012. The disposal of the question posed will ultimately and definitely dispose the matter without the need to go to trial.
- C
- D
- E [22] Looking at the sale and purchase agreement between the parties, it is abundantly clear that the sale is an outright sale. It is provided in the agreement that “Dengan ini tanah yang disebutkan itu adalah menjadi hak pembeli dan tiada orang lain berhak untuk ganggu dan sebagainya sepertimana yang telah saya persetujui dengan pembeli”. It is also stated that consideration of RM5,000 had been paid to the vendor and that “pembeli membina sebuah rumah untuk kediaman keluarganya.”
- F
- G [23] The prohibition on transfer to a non-Malay must be considered at the relevant time when the transaction took place ie, when the sale and purchase agreement was entered into in 1993. At that time, the said Lazim bin Kanan was not a citizen of Malaysia (his status as a citizen of Malaysia was only conferred upon him on 16 December 2010). Therefore he cannot claim to be a Malay for the purpose of the Enactment. He was not eligible to be one at the material time.
- H
- I [24] The prohibition under the Enactment (Chapter 142) is against any dealing of a Malay reserved land to any person not being a Malay. Section 2 of the same Enactment (Chapter 142) defines “Malay” as a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language

and professes the Muslim religion. The words “Malayan race” must refer to a race in our country, Malaysia (or Malaya previously). In other words, it must refer to a citizen of the country, but not to a non-citizen. A

[25] In this respect, the definition of the word “Malay” in art. 160 of the Federal Constitution can be a good guidance. In the article, “Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and: B

(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or C

(b) is the issue of such a person. D

[26] At the material time the said Lazim bin Kanan may be someone who habitually “speaks the Malay language, professes the religion of Islam and conforms to Malay custom”. However, he did not qualify for the citizenship requirement either under paras. (a) or (b) of the definition - because he was born in Indonesia in 1946 (before Merdeka Day) and not in the Federation or in Singapore. There is also no evidence to show that he was “born of parents one of whom was born in the Federation or in Singapore or is on that day domiciled in the Federation or in Singapore.” E F

[27] In his submissions before us, learned counsel for the respondents conceded that the said Lazim bin Kanan was not a Malay when the alleged sale transaction in respect of the said land took place in 1993. However, he submitted the respondents had been occupying and staying on the said land for a long period (since 1993) and therefore it is only fair and just that the respondents be given continued possession of the said land. G

[28] In this respect, Abdul Hamid Mohamad FCJ in the Federal Court case of *Robert Lee & Anor (supra)* had given a sufficient answer in the following passage: H

It is true that the courts, through its decisions try to arrive ‘fair and just’ results. But it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. Our British colonial masters saw it necessary to make laws I

- A to protect the ownership of a class of persons over some areas of land. Laws were thus enacted as a matter of policy. These laws are preserved by the Constitution. If at all these laws need to be amended or repealed, this should, as a matter of policy, be done by the legislature, not by the courts through their decisions.
- B [29] At para 57, p. 20 (CLJ) para. 58, p. 407 (MLJ) of the above case, His Lordship continued:
- C The decisions in the court below were based on what was perceived as fair and just. Here it was not just the issue of whether it would be more fair to decide in favour of the Plaintiffs or the Defendants. The court was faced with an illegal act by both of them, the result of which would cause at least one of them to suffer losses. The court had to deal with the acts of two persons that contravened the written law and which, if given effect to, would defeat the whole purpose of the written law.
- D [30] Since a non-Malay purchaser cannot acquire title to a Malay reserved land under the Enactment, there cannot be any other way by which such a purchaser can acquire it. A long period of occupation and stay on the said land in question by the respondents cannot create any form of entitlement on the said land. To allow the purchaser to acquire title by any other mean not in accordance with the enactment would defeat the purpose of the Enactment. On this issue, Abdul Hamid Mohamad, FCJ in *Robert Lee & Anor's* case (*supra*) had indicated that:
- F The Ordinance was enacted for the protection of certain classes of people. Cases on Malay reserved lands were also to the same effect. The fact that the land had been occupied by the others for a length of time did not extinguish the landholders' title to the said lands.
- G [31] In another Federal Court case of *Haji Hamid Ariffin & Anor v. Ahmad Mahmud* [1976] 1 LNS 36; [1976] 2 MLJ 79, Suffian LP in dealing with the same provision in the Kedah Malay Reservation Enactment had ruled that by virtue of s. 6(2) of the said Enactment the purported sale of the land, to a non-Malay was void *ab initio* and it could not be enforced by the purchaser. Every enactment must be looked at in the spirit in which it was enacted. In the case of the Malay Reservations Enactment, the aim was to safeguard Malay ownership of Malay reservation lands.
- H To hold otherwise would be flying in the teeth of the clearest language used by the Legislature.
- I

Conclusion

[32] Based on the above considerations, we are of the view that:

- (a) the appellants' application under O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980 (now the Rules of Court 2012) is an appropriate case to be determined summarily under the said orders. The relevant undisputed facts are sufficient to determine the question posed by the appellants. There is no necessity to go for trial to adduce other evidence as ordered by the learned judge;
- (b) based on the undisputed relevant facts relating to the issue in question and the interpretation of the relevant laws and documents in the present case, the answer to the question posed by the appellants must be in the negative ie, a Malay reserved land held under title GM 820, Lot 1642 Mukim Kajang, Daerah Hulu Langat, Negeri Selangor, Darul Ehsan cannot be sold to a non-Malay or non-citizen as elaborated above. The said sale and purchase agreement relied upon by the respondents is void *ab initio* and therefore unenforceable; and
- (c) we therefore allow the appeal with no order as to costs and enter judgment in favour of the appellants (the plaintiffs) as claimed. We also order that the deposit be refunded to the appellants.

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